AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era—Individual Rights/Religion/Establishment

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Bush v. Holmes, 919 So. 2d 392 (FL 2006)

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*Ruth Holmes was the parent of children attending public schools in Florida. In 1999, as part of a broader education reform effort, Florida adopted a limited voucher program—the Opportunity Scholarship Program (OSP)—that provided partial tuition for students attending "failing" public schools to transfer to more successful private schools. The program was reauthorized by subsequent legislatures. The OSP and the broader education reform were adopted after a 1998 amendment to the Florida Constitution declared that education was a "fundamental value" and charged the state with making "adequate provision for the education of all children" in the state. The amendment was a response to a 1996 state supreme court ruling that the constitutional requirement on education did not provide sufficiently specific standards to allow judicial review of Florida's school financing. Holmes sued Governor Jeb Bush, claiming that the OSP violated the provisions on education in the Florida Constitution. Holmes initially claimed that the OSP violated the establishment clause of the First Amendment, as incorporated by the due process clause of the Fourteenth Amendment. After the U.S. Supreme Court decided that an Ohio school voucher program did not unconstitutionally violate the separation of church and state [*Zelman v. Simmons-Harris *(2002)] that component of the Florida suit was dropped. A state trial court declared the OSP unconstitutional under the Florida state constitution. A divided appeals court affirmed that ruling. Governor Bush appealed to the Florida Supreme Court.*

The Florida Supreme Court by a 5-2 vote declared the Florida voucher scheme violated the state constitution. Chief Justice Pariente's majority opinion held that the state constitution required the state legislature to provide an adequate public school education for all children. Why did he reach that conclusion? In what ways did Pariente think the Florida Constitution different from the Constitution of the United States? Was he simply more liberal than the justices in the Zelman *majority or was the Florida Constitution sufficiently different from the Constitution of the United States to compel a different result?*

CHIEF JUSTICE PARIENTE delivered the opinion of the Court.

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As a general rule, courts may not reweigh the competing policy concerns underlying a legislative enactment. The arguments of public policy supporting both sides in this dispute have obvious merit, and the Legislature with the Governor's assent has resolved the ensuing debate in favor of the proponents of the program. In most cases, that would be the end of the matter. However, as is equally self-evident, the usual deference given to the Legislature's resolution of public policy issues is at all times circumscribed by the Constitution. Acting within its constitutional limits, the Legislature's power to resolve issues of civic debate receives great deference. Beyond those limits, the Constitution must prevail over any enactment contrary to it.

Thus, in reviewing the issue before us, the justices emphatically are not examining whether the public policy decision made by the other branches is wise or unwise, desirable or undesirable. Nor are we examining whether the Legislature intended to supplant or replace the public school system to any greater or lesser extent. Indeed, we acknowledge, as does the dissent, that the statute at issue here is limited in the number of students it affects. However, the question we face today does not turn on the soundness of the legislation or the relatively small numbers of students affected. Rather, the issue is what

limits the Constitution imposes on the Legislature. We make no distinction between a small violation of the Constitution and a large one. Both are equally invalid. Indeed, in the system of government envisioned by the Founding Fathers, we abhor the small violation precisely because it is precedent for the larger one.

Our inquiry begins with the plain language of the second and third sentences of article IX, section 1(a) of the Constitution. The relevant words are these: "It is . . . a paramount duty of the state to make adequate provision for the education of all children residing within its borders." Using the same term, "adequate provision," article IX, section 1(a) further states: "Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools." For reasons expressed more fully below, we find that the OSP violates this language. . . . Many standards imposed by law on the public schools are inapplicable to the private schools receiving public monies. In sum, through the OSP the state is fostering plural, nonuniform systems of education in direct violation of the constitutional mandate for a uniform system of free public schools. Because we determine that the OSP is unconstitutional as a violation of article IX, section 1(a), we find it unnecessary to address whether the OSP is a violation of the "no aid" provision in article I, section 3 of the Constitution, as held by the First District.

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The Florida Constitution has contained an education article since its inception in 1838. . . . In 1868, the education article was significantly expanded, and included the first requirement that the state provide a system of free public schools for all Florida children:

> Section 1. It is the paramount duty of the State to make ample provision for the education of all the children residing within its borders, without distinction or preference.
> Section 2. The Legislature shall provide a uniform system of Common Schools, and a University, and shall provide for the liberal maintenance of the same. Instruction in them shall be free.

. . .

The adoption of the 1968 Constitution saw another substantial revision of the education article, with section 1 of article IX providing that

> adequate provision shall be made by law for a uniform system of free public schools and for the establishment, maintenance and operation of institutions of higher learning and other public education programs that the needs of the people may require.

. . . The effect of the addition of the phrase "adequate provision" was analyzed in Coalition for Adequacy & Fairness, in which we ultimately concluded that it is the Legislature, not the Court, that is vested with the power to decide what funding is "adequate."

In 1998, in response in part to Coalition for Adequacy & Fairness, the Constitutional Revision Commission proposed and the citizens of this state approved an amendment to article IX, section 1 to make clear that education is a "fundamental value" and "a paramount duty of the state, "and to provide standards by which to measure the adequacy of the public school education provided by the state . . . .

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. . . Currently, article IX, section 1(a), which is stronger than the provision discussed in Henderson, contains three critical components with regard to public education. The provision (1) declares that the "education of children is a fundamental value of the people of the State of Florida," (2) sets forth an education mandate that provides that it is "a paramount duty of the state to make adequate provision for the education of all children residing within its borders," and (3) sets forth *how* the state is to carry out this education mandate, specifically, that "*adequate* provision shall be made by law for a uniform, efficient, safe, secure, and *high quality system of free public schools*." (Emphasis supplied.)

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The constitutional language omitted from the legislative findings is crucial. This language acts as a limitation on legislative power. Absent a constitutional limitation, the Legislature's "discretion reasonably exercised is the sole brake on the enactment of legislation." . . .

Article IX, section 1(a) is a limitation on the Legislature's power because it provides both a mandate to provide for children's education and a restriction on the execution of that mandate. . . . As we stated in construing a different constitutional amendment, the provision should "be construed as a whole in order to ascertain the general purpose and meaning of each part; each subsection, sentence, and clause must be read in light of the others to form a congruous whole." . . .

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. . . We agree with the trial court that article IX, section 1(a) "mandates that a system of free public schools is the manner in which the State is to provide a free education to the children of Florida" and that "providing a free education . . . by paying tuition . . . to attend private schools is a 'a substantially different manner' of providing a publicly funded education than . . . the one prescribed by the Constitution." . . .

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The Constitution prohibits the state from using public monies to fund a private alternative to the public school system, which is what the OSP does. Specifically, the OSP transfers tax money earmarked for public education to private schools that provide the same service—basic primary education. . . .

Section 1002.38(6)(f), Florida Statutes (2005), specifically requires the Department of Education to "transfer from each school district's appropriated funds the calculated amount from the Florida Education Finance Program and authorized categorical accounts to a separate account for the Opportunity Scholarship Program." Even if the tuition paid to the private school is less than the amount transferred from the school district's funds and therefore does not result in a dollar-for-dollar reduction, as the dissent asserts, it is of no significance to the constitutionality of public funding of private schools as a means to making adequate provision for the education of children.

. . . [B]ecause voucher payments reduce funding for the public education system, the OSP by its very nature undermines the system of "high quality" free public schools that are the sole authorized means of fulfilling the constitutional mandate to provide for the education of all children residing in Florida. . . .

. . . The OSP makes no provision to ensure that the private school alternative to the public school system meets the criterion of uniformity. In fact, in a provision directing the Department of Education to establish and maintain a database of private schools, the Legislature expressly states that it does not intend "to regulate, control, approve, or accredit private educational institutions."

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Reinforcing our determination that the state's use of public funds to support an alternative system of education is in violation of article IX, section 1(a) is the limitation of the use of monies from the State School Fund set forth in article IX, section 6. That provision states that income and interest from the State School Fund may be appropriated "only to the support and maintenance of free public schools." . . .

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We reject the argument that the OSP falls within the state's responsibility under article IX, section 1(a) to make "adequate provision . . . for . . . other public education programs that the needs of the people may require." As this Court explained in Board of Public Instruction, the reference to "other public education programs" added in 1968 "obviously applies to the existing systems of junior colleges, adult education, etc., which are not strictly within the general conception of free public schools or institutions of higher learning." . . .

The OSP is distinguishable from the program at issue in *Scavella v. School Board of Dade County* (FL 1978), under which exceptional students could attend "private schools because of the lack of *special* services" in their school district. (emphasis supplied). . . . Further, it was not the program itself that was challenged in Scavella but a subsequent amendment to the program that placed a cap on the amount of money a school district could pay to a private institution. . . .

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JUSTICE BELL, dissenting.

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This Court has long proclaimed that courts "have the power to declare laws unconstitutional only as a matter of imperative and unavoidable necessity," . . .

This judicial deference to duly enacted legislation is derived from three "first principles" of state constitutional jurisprudence. First, the people are the ultimate sovereign. . . . Second, unlike the federal constitution, our state constitution is a limitation upon the power of government rather than a grant of power . . . . Third, because general legislative or policy-making power is vested in the legislature, the power of judicial review over legislative enactments is strictly limited. Specifically, when a legislative enactment is challenged under the state constitution, courts are without authority to invalidate the enactment unless it is clearly contrary to an express or necessarily implied prohibition within the constitution . . . .

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The majority's reading of article IX, section 1 is flawed. There is no language of exclusion in the text. Nothing in either the second or third sentence of article IX, section 1 requires that public schools be the sole means by which the State fulfills its duty to provide for the education of children. And there is no basis to imply such a proscription.

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. . . This mandate is to make adequate provision for a public school system. The text does not provide that the government's provision for education shall be "by" or "through" a system of free public schools. Without language of exclusion or preclusion, there is no support for the majority's finding that public schools are the exclusive means by or through which the government may fulfill its duty to make adequate provision for the education of every child in Florida.

As the ultimate sovereign, if the people of Florida had wanted to mandate this exclusivity, they could have very easily written article IX to include such a proscription. Ten other states have constitutional provisions that expressly prohibit the allocation of public education funds to private schools. . . . However, the people of Florida have not included such a proscription in article IX, section 1 of the Florida Constitution. . . .

Because the plain language of article IX, section 1 is wholly sufficient to conclude that this provision does not prohibit a program such as the OSP, it is unnecessary and improper to go beyond the text by citing to the intent of the voters and drafters. . . .

. . . Nowhere in this ballot summary were the voters informed that by adopting the amendments, they would be mandating that the public school system would become the exclusive means by which the State could fulfill its duty to provide for education. . . . The ballot summary explained these amendments to the voters in this way:

> Declares the education of children to be a fundamental value to the people of Florida; establishes adequate provision for education as a paramount duty of the state; expands constitutional mandate requiring the state to make adequate provision for a uniform system of free public schools by also requiring the state to make adequate provision for an efficient, safe, secure and high quality system.

Significantly, the only reference to a mandate in the ballot summary is in regard to the preexisting third sentence, and this reference only speaks of "expanding the constitutional mandate requiring the State to make adequate provision for" the public school system. . . .

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A review of the minutes of the meetings of the Commission reveals a finding that a proposal to preclude educational vouchers was actually presented to the Commission by the public, but never accepted. . . . The debate over education vouchers had been a matter of nationwide public debate since at least the early 1990s. For example, in 1992 the Wisconsin Supreme Court upheld a program similar to the

OSP under an education article that also required the state legislature to provide by law for the establishment of a uniform public school system. . . .

Again, the Commission's goal, as stated by Commissioner Jon Mills, was "to increase the State's constitutional duty and raise the constitutional standard for education." As another commissioner explained:

> Now I want to point out clearly and for purposes of intent that as the education of our children in the state move in various directions, whether it be charter schools, private schools, public schools, and whatever preference you have as to how our children are educated, this amendment [to article IX] does not address that.
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> What this amendment does is says that as we move off in those directions . . . this amendment is going to ensure everyone moves together, that every child is ensured an education: the poor, the black, the whites, the Asians, the Hispanics. Every one will be ensured this fundamental right, no matter what direction this State takes.

Florida Constitution Revision Commission, Meeting Proceedings for January 15, 1998 . . . . A number of other commissioners affirmed this position, voicing their convictions that the amendments to article IX should not limit the Legislature's authority to determine the best method for providing education in Florida. . . .

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In accord with courts across this nation, this Court has long recognized that the *expressio unius* maxim should not be used to imply a limitation on the Legislature's power unless this limitation is absolutely necessary to carry out the purpose of the constitutional provision. We have repeatedly refused to apply this maxim in situations where the statute at issue bore a "real relation to the subject and object" of the constitutional provision, or did not violate the primary purpose behind the constitutional provision. . . . it is not absolutely necessary to imply such a limitation upon the Legislature's power in order to carry out the purpose of article IX, section 1, it is improper for this court to use *expressio unius* as the basis for doing so.

. . . In fact, in the more than 150 years that section 6 has been a part of Florida's Constitution, it has never been interpreted as preventing the State from using public funds to provide education through private schools. . . . When the Florida House of Representatives considered language for the 1968 constitution, it rejected a proposal to add a section to article IX that would have limited the Legislature's use of education funds by preventing any state money from going to sectarian schools. . . .

Given the fact that neither the text nor the history of article IX supports the majority's reading of this provision as "mandating that 'adequate provision for the education of all children' shall be by a . . . system of free public schools," the only other basis for concluding that the OSP violates article IX is to establish that the program prevents the Legislature from fulfilling its duty to make adequate provision by law for the public school system. The majority does not cite, nor can I find, any evidence in the record before us to support such a finding. . . .

Indeed, the statute authorizing the OSP presents the public school system as the first option for parents with children in a public school that has twice failed to meet the Legislature's educational standards. . . . In addition, the legislative history surrounding the OSP indicates that the purpose behind the program was to improve the public school system by increasing accountability in education. . . .

Moreover, there is absolutely no evidence that the OSP prevents the Legislature from making adequate provision for a public school system. Opportunity scholarships are available on a very limited basis-only to students whose public school has repeatedly failed to meet the Legislature's minimum standard for a "high quality education." While the scholarships are taken from public moneys allocated to public education, the amount of money removed from the public schools is not a dollar-for-dollar reduction because the opportunity scholarships are capped at the nonpublic school's tuition. On average, this is apparently less than the per-pupil allocation to public schools. . . . Furthermore, the program is part of a broader education initiative that provides additional assistance to failing schools. . . .